December 27, 1999

Mr. William E. Wood
Assistant City Attorney
City of San Antonio
P. O. Box 839966
San Antonio, Texas 78283-3966

OR99-3778

Dear Mr. Wood:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 130119.

The City of San Antonio (the "city") received a request for information that is maintained on City Manager Alex Briseño's and his staff's computers.[1] Specifically the requestor has asked for the following information:

> 1. any and all Internet sites marked as "Favorites" on Microsoft's Internet Explorer on any computer in the office of the City Manager, both desktops and notebooks in the office of the City Manager personnel
>
> 2. copies of the History folders on Microsoft's Internet Explorer on any computer in the office of the City Manager, both desktops and notebooks in the office of the City Manager personnel

[1]You state in your October 4, 1999 letter that, contingent upon the outcome of the city's request for a ruling and the response from the requestor to the city's cost estimate provided pursuant to section 552.2615, the city anticipates raising specific exemptions. Please note that the cost provisions do not affect the time deadlines imposed on a governmental body to seek a ruling under section 552.301. Gov't Code §552.2615(g). As of the date of this letter, the city has not informed this office that the request has been withdrawn by operation of section 552.2615(c).

> 3. copies of any and all outgoing personal e-mail sent by City Manager Alex Breseno [sic] on any computer paid for by the taxpayers and which could be reasonably construed as intended primarily for government use

You contend that portions of the requested information are not public information subject to the Act, but rather, personal information. Section 552.002 of the Act defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body and the governmental body owns the information or has a right of access to it." This office has interpreted section 552.002 to mean that virtually all information in the physical possession of a governmental body is "public information" subject to the Act. Open Records Decision No. 549 (1990).

We have observed, however, that certain factors are relevant in deciding whether a document is essentially a governmental or a personal document. Although not exhaustive, these factors include: who prepared the document; the nature of its contents; its purpose or use; who possessed it; who had access to it; whether the governmental body required its preparation; and whether its existence was necessary to or in furtherance of official business. Open Records Decision No. 635 at 4-5 (1995). We will refer to these factors as we determine whether the information requested is public information within the meaning of the Act.

The information requested in Item 1 is for any Internet sites marked as "Favorites" on Microsoft's Internet Explorer on any computer in the office of the City Manager. The "Favorites Directory" is composed of a compilation of Internet sites. The user has the ability to add, file, and edit the "Favorites Directory" to create a compilation of Internet sites that are frequented by the user. Access to an Internet site is then facilitated by merely "clicking" on the Internet site in the "Favorites Directory." The city did not submit the specific information requested or representative samples of the requested Internet site "Favorites." In this case we presume that the information in the "Favorites Directories" was prepared by the City Manager or staff on city equipment, that it was created and used in furtherance of official city business, and that the city has a right of access to it. We, therefore, conclude that the "Favorites" information is public information subject to disclosure.

As to the information requested in Item 2, you explain that the History files are copies of web sites which may be stored on the hard drive of the local computer. You state the History files are maintained on Microsoft's Internet Explorer and the content of the files is controlled by and owned by the author of the web site, not the government computer and not the user of the local computer. You further state that no "customization or communication takes place" in the History files. Furthermore, you explain that the History files are merely "passive mirror images of the remote site" and they allow for more efficient use of the Internet. Although the City Manager and his staff have access to the History files, the city does not

own the requested information. In this case we cannot conclude that the History file information is public information within the meaning of the Act. *Cf.* Open Records Decision 581 (1990). You have explained how and why this information is not subject to the Act. Therefore, it need not be released pursuant to the Act. Because we find that the History file information need not be released, we need not address your copyright argument.

With regard to the information requested in Item 3, this office received a letter from you on October 12, 1999, in which you provided copies of three messages sent from Mr. Briseño's computer over the Internet. You state that the e-mail messages were sent from a computer provided to Mr. Briseño by the city. You argue that the three e-mail messages should not be disclosed under the "fair meaning of the Act" because access to Mr. Briseño's computer is password protected and these e-mail messages do not constitute the conduct of official business of the city. Although, the information on Mr. Briseño's computer does not preclude the right of access to and ownership of the information by the city, the purpose of the information was personal and it was not necessary to nor was it created in furtherance of official business. Therefore, we find that the information requested in Item 3 is not public information within the meaning of the Act. You need not release the e-mails submitted.

As we have determined that the information requested in Item 1 is public information, we will address its release. The city did not provide the specific information requested or representative samples of the information requested in Item 1or indicate that it exists.[2] If indeed the information does exist, the city did not claim any exceptions to its disclosure or provide any written comments as to why the requested information in Item 1 should be withheld.

Moreover, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e).

A governmental body's failure to state an exception under 552.301(b) and to submit to this office the information required under 552.301(e) results in the legal presumption that the information is public and must be released. Gov't Code § 552.302. Information that is presumed public must be released unless a governmental body demonstrates a compelling

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[2] The Act does not require a governmental body to make available information which does not exist at the time of the request. Open Records Decision No. 362 (1983).

reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make a compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982).

If a governmental body wishes to withhold particular information, it must establish that a particular exception applies to the information. Gov't Code § 552.301(e). If a governmental body does not establish how and why an exception applies to the requested information, the attorney general has no basis on which to pronounce it protected. *See* Open Records Decision No. 363 (1983). Because the city has not raised any exceptions or demonstrated a compelling reason to overcome the presumption that the information requested in Item 1 is public information, it must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

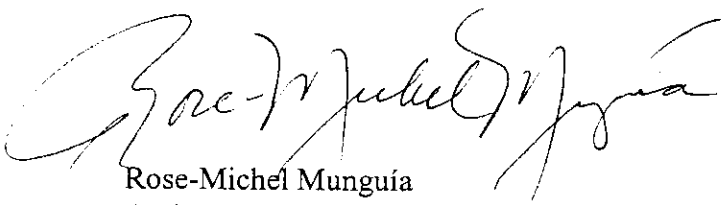
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Rose-Michel Munguía
Assistant Attorney General
Open Records Division

RMM/jc

Ref: ID# 130119

Encl. Submitted documents

cc: Mr. Jason Stanford
1901 West 41st Street
Austin, Texas 78731-6020
(w/o enclosures)